

Dutch 10

S E N T E N C E

The Special Court in Amsterdam, First Chamber;

Having seen the documents, among which was the subpoena served in the name of the Public Prosecutor on the accused, named later, in person on 28th April 1948:

Having heard the accusation brought by the Public Prosecutor against the accused, according to his own statement named:

WILHELM FRIEDRICH WALTER GERBSCH,

fish dealer, born 11th March 1890 in SCHWERIN and living in SCHWERIN, now detained in No.2 Detention Prison, Amsterdam.

In view of the investigation carried out at the sitting;

The demand of the Public Prosecutor having been heard;

In view of the defence put forward by and on behalf of the accused;

Considering that the accused has been summoned to appear on the charge: that he, in ZÜSCHEN, at anyrate in Germany, at anyrate there or elsewhere in Europe, on various dates in the years 1944 and 1945, each during the time of the war begun by Germany against the Netherlands on 10th May 1940 but before 15th May 1945, making use of the power, opportunity and means offered him by his office and by the enemy and the fact of the enemy occupation of the Netherlands and of other European countries - namely, employed in the German state or public service as a guard over persons of various nationalities residing in the Penal Camp in or near ZÜSCHEN, which persons had been deported or transferred to Germany, and by means of a stick, at anyrate a rubber truncheon, at any rate a blunt weapon, the which was carried by him in the execution of his duty - intentionally,

primary charge: in the said Camp instituted, or at anyrate applied, a system of serious ill - treatment of which Netherlands, at anyrate persons deported or transferred from the Netherlands to Germany and detained in that camp were also the victims; as indeed were a great number of the persons placed under his orders or supervision at that time:

(a.) having resolved thereto, after calm deliberation, repeatedly and violently struck them with a blunt weapon so that severe bodily injury was inflicted on them, as a result, or partial result, of which these persons died, it being understood that the accused intentionally and repeatedly made the detainee A.M. PIEL, at anyrate a person known to his fellow-prisoners by the name PETERS or PIET the Amsterdammer, push a fully loaded wheelbarrow and if this person could not go on further intentionally, repeatedly and violently struck him with a blunt weapon until he became unconscious, at anyrate fell down and did not get up again, and that he, the accused, intentionally, repeatedly and violently struck HENRICUS GERARDUS KOCHX with a blunt weapon until the latter fell down and then made him, still living, lie down under his, the accused's supervision in a coffin which was being used for the burial of a dead man:

(b.) intentionally, repeatedly and violently struck with a blunt weapon in the cases, under the circumstances and with the results previously mentioned;

alternative charge: the facts as stated in the primary charge, under the circumstances and with the results there mentioned, it being understood that the accused in this acting did so as an official in the State or public service of the enemy within the limits of the power allowed him as such, and in connection with the war of aggression unleashed by Germany against the Netherlands and other countries, intentionally acted contrary to the laws and customs of war, at anyrate of humanity he, the accused, having intentionally committed terrorism against Netherlands and against persons by whose ill-treatment the interest of the Netherlands was or could be harmed.

- Considering -

ill. Treatment

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The demand of the Public Prosecutor having been heard;

In view of the defence put forward by and on behalf of the accused;

Considering that the accused has been summoned to appear on the charge:

that he, in ZÖSCHEN, at anyrate in Germany, at anyrate there or elsewhere in Europe, on various dates in the years 1944 and 1945, each during the time of the war begun by Germany against the Netherlands on 10th May 1940 but before 15th May 1945, making use of the power, opportunity and means offered him by his office and by the enemy and the fact of the enemy occupation of the Netherlands and of other European countries - namely, employed in the German state or public service as a guard over persons of various nationalities residing in the Penal Camp in or near ZÖSCHEN, which persons had been deported or transferred to Germany, and by means of a stick, at anyrate a rubber truncheon, at any rate a blunt weapon, the which was carried by him in the execution of his duty - intentionally,

primary charge: in the said Camp instituted, or at anyrate applied, a system of serious ill - treatment of which Netherlands, at anyrate persons deported or transferred from the Netherlands to Germany and detained in that camp were also the victims; as indeed were a great number of the persons placed under his orders or supervision at that time:

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(b.) intentionally, repeatedly and violently struck with a blunt weapon in the cases, under the circumstances and with the results previously mentioned;

alternative charge: the facts as stated in the primary charge, under the circumstances and with the results there mentioned, it being understood that the accused in this acting did so as an official in the State or public service of the enemy within the limits of the power allowed him as such, and in connection with the war of aggression unleashed by Germany against the Netherlands and other countries, intentionally acted contrary to the laws and customs of war, at anyrate of humanity he, the accused, having intentionally committed terrorism against Netherlands and against persons by whose ill-treatment the interest of the Netherlands was or could be harmed.

- Considering -

Considering that at the sitting - briefly related - the following have stated and declared:

witness THEODORUS WILHELMUS BURGERS:

that in April 1944 he was arrested in Beverwijk and in August 1944, after having been kept in prison till then, was shut up in a penal camp near ZÜSCHEN in Germany; that he was in this camp until the liberation in the spring of 1945; that in the said camp were a great number of people of Dutch and other nationalities who had been deported from their own country and taken to the said camp; that the camp guards, of whom accused was one, were all guilty of ill-treating the people in the camp; that accused, as he witness, saw using a rubber truncheon thrashed and ill-treated a great number of the people under his supervision, this causing severe bodily injury to the said persons, as a result of which they fell down, unconscious and in several cases gave no further signs of life; that the accused as witness saw, made a prisoner, known to his fellow prisoners as PETERS or PIET the Amsterdammer, repeatedly push a fully loaded barrow up and down a slope; that as he was doing this the accused continually thrashed PETERS with a rubber truncheon when he, PETERS, did not go on fast enough, that PETERS repeatedly collapsed and was then beaten by the accused until he got up again; that he, witness took PETERS back to the latter's room when work was over; that PETERS then showed no signs of life; that a few days later he buried PETERS in the cemetery of the camp where he, witness, had been put to work; that during the time that he, witness, was working in the cemetery, in a few months he buried the bodies of 563 prisoners who had died from exhaustion and ill-treatment; that he, witness, arrested the accused after the liberation and made him over to the commandant of the American troops in ZÜSCHEN; that at the interrogation to which the accused was at once submitted he acknowledged having beaten 80 to 90 prisoners to death;

witness ADRIANUS FRANCISCUS van DALEN:

that at the end of June 1944 he was arrested in the Netherlands, then deported to Germany where he was shut up in the camp at ZÜSCHEN, remaining there till the liberation in the spring of 1945; that there were persons of several nationalities in this camp; that many of the guards in the said camp were guilty of ill-treating the prisoners under their supervision; that the accused, whom he recognises at the sitting as one of the guards, at the said camp, made a habit of hitting the prisoners on the neck and ~~xxx~~ back with a rubber truncheon or a spade; that the accused used to thrash people freely without any cause having been given for it; that he, witness, saw that a certain PETERS from Amsterdam was made by the accused to push a fully loaded wheelbarrow repeatedly up and down a slope; that the accused beat PETERS again and again with a rubber truncheon whenever PETERS could not go on any longer; that in the end PETERS fell down and did not get up again, he then being carried away by his fellow-prisoners; that a few days later he heard that PETERS was dead;

witness JOHANNES LODEWIJK KIESOUW:

that he was arrested in Amsterdam in June 1944 and then, via other camps, deported to Germany and there shut up in ZÜSCHEN camp; that the accused thrashed and ill-treated innumerable prisoners in the said camp; that a great number of the prisoners died as a result of these ill-treatments; that according to him, witness, the accused ill-treated a good hundred prisoners in the way in which he treated a certain PETERS, also called PIET the Amsterdammer; that the accused made this PETERS push a fully loaded barrow up a slope; that the accused walked behind PETERS and beat him whenever he, PETERS, exhausted could not go on any more; that accused beat PETERS with great force; that PETERS finally fell down and did not get up again; that he, witness, together with a number of fellow-prisoners carried PETERS away; that PETERS was then unconscious; that he, witness, heard some time later that PETERS had died from the results of the ill-treatment;

witness THEODORUS FRANCISCUS BRUNOT, MARTINUS ADRIANUS BRUYNS, HENRI-CUS LEUVEN, WIEGER van COESTEN, AART KOP, FRANS KOP and CORNELIS MARI-NUS FLOOY, each individually but all to ^{the} same effect:

- that -

that in 1944 and 1945 they had to do with the accused as a guard in the camp in ZÜSCHEN, to which camp they had been brought from the Netherlands as prisoners; that accused ill-treated numbers of prisoners by hitting them with a blunt weapon, full force being used; that on account of his cruel behaviour the accused was among the most feared guards in the camp; that he went in for flogging without any feeling of humanity; that several guards in that camp were guilty of ill-treating the prisoners;

Considering that a statement dated 29th Aug. 1947 made out on oath of office by JACOB AKKERMAN, police-sergeant, Amsterdam, municipal police also special constable, employed in the War Crimes Investigation Office, among other things contains in brief in the form of a statement by

TEUNIS ARIE van ZANTEN:

that after being arrested in Rotterdam in 1944 he was shut up in the camp at ZÜSCHEN that he made the acquaintance of the German GERBSCH in the said camp; that GERBSCH beat a certain PETERS from Amsterdam badly after an abortive attempt to escape that PETERS died two or three days later; that he, Van ZANTEN, was present at GERBSCH's arrest after the Capitulation of Germany; that GERBSCH admitted then that he had beaten 80 to 90 prisoners to death;

Considering that witness withdrew the above statement at the sitting but that the Court holds him to it nevertheless as he can give no acceptable reason ~~for~~ why he ~~withdrew~~ withdrew it;

Accused:

that in 1944 he was taken on as an emergency policeman (Not-gendarme) by the Gendarmerie in Germany and, after having being detached in HALLE, was appointed as a guard over the persons who were in the camp at Züschén; that as guard he wore a uniform and was armed with a rifle and a rubber-truncheon; that his job as guard was to supervise the behaviour and work of the persons in the camp; that he had to see that these persons worked industriously; that he did beat prisoners with his rubber truncheon; that he was present at the ill-treatment of a certain PETERS who had to push a fully loaded wheelbarrow up a slope; that persons of various nationalities were in the camp as prisoners; that he worked as a guard till the capitulation of Germany in the spring of 1945; that in the years 1944 up to May 1945 he knew that Germany was at war with the Netherlands at that time.

Considering that through the aforesaid contents of the evidence appearing above the facts and circumstances mentioned therein are definitely established, and on these grounds the Court is convinced and considers it legally proved that the accused, in ZÜSCHEN, on various dates/the power, opportunity and means offered him by his office and by the enemy and the fact of the enemy occupation of the Netherlands and of other European countries - to wit, employed in German state service as a guard over persons of various nationalities temporarily residing in the penal camp in ZÜSCHEN, which persons had been deported or transferred to Germany, and by means of a stick carried by him in the execution of his duty, applied a system of ill-treatment in the said camp of which also persons deported or transferred from the Netherlands to Germany and detained in that camp were the victims; that he at that time intentionally, repeatedly and violently struck a great number of persons placed under his supervision so that severe bodily injury followed as a result of which various of these persons died, it being understood that the accused in particular intentionally and repeatedly made a person known to his fellow-prisoners by the name PETERS, or PIET the Amsterdammer, push a fully loaded wheelbarrow and if this person could not go on, intentionally, repeatedly and violently struck him with a blunt weapon until he fell down and did not get up again; whereby the accused as an official in the State service of the enemy acted within the limits of the power allowed him as such and, in connection with the

- war -

in the years 1944 and 1945, making use of

war of aggression unleashed by Germany against the Netherlands and other countries, intentionally acted contrary to humanity, he, the accused, having intentionally committed terrorism against Netherlands and against persons by the ill-treatment of whom the interest of the Netherlands was or could be harmed;

Considering that nothing further or otherwise charged against the accused has been legally and convincingly proved than has been accepted above as proved, so that he must be acquitted thereof;

Considering that on the ground of the witnesses' statements and those of the accused the Court accepts as definitely established and proved that in several cases the accused inflicted severe bodily injury on other people and this, namely severe bodily injury, intentionally, in that the unrestricted beating with a rubber truncheon of other persons, full force being applied, so that the said persons fell down under the beating and often lost consciousness, constituted the infliction of severe bodily injury, especially when this ill-treatment was applied to persons who, as is generally known was the case with the slave labourers in a camp such as Zöschen, were in a chronic state of wasting undernourishment and neglect, and without any of those powers of resistance natural to a normal person, so that for these persons especially the said ill-treatments constituted a danger to life, or an inherent danger of permanent and fatal injury to health, and the manner of the serious ill-treatment formed that which is understood by the law as the infliction of severe bodily injury; furthermore, intentional, because from the way the accused behaved and acted the Court considers that legal and convincing proof had been produced that he deliberately inflicted the said severe bodily injury, fully understanding the results attached to his way of acting and the state of the persons against whom this was directed. And this in several cases, the Court considering this as proved by the evidence quoted above, so that a number of these cases must be considered as constituting each in itself the crime of serious ill-treatment;

Considering that it is also definitely established that in several cases the manner in which the accused intentionally acted resulted in death;

Considering that at the time the accused committed the acts declared above as proved it was generally known, and is also now known, that Germany was then carrying on a war of aggression against the Netherlands and other countries, and that the persons forced to remain in the camp at Zöschen had fallen into the power of the enemy as a result of this war of aggression;

Considering that counsel for the accused has put forward the juridical defence that the Special Court is not competent, relatively that it lacks jurisdiction, to judge accused in cases such as the present, seeing that the accused is a German and the act as charged constitutes a war crime committed on German territory, in committing which the accused acted in the public service of the German State, so that here the jurisdiction of the Netherlands judge is said to be excluded by international law;

Considering with regard to this that in general, by virtue of article 4 of the Extraordinary Penal Law Decree of 22 December 1943, amended by the laws of 27 June and 10 July 1947, the Netherlands judge is accorded jurisdiction with regard to anyone who, when outside the realm in Europe, has been guilty of the crimes enumerated in that article, to which among others belong, A: the crimes specified in articles 300 - 304 of the Penal Code (the various forms of ill-treatment) and, B: that of "during the time of the war begun by Germany against the Netherlands on 10 May 1940 but before 15 May 1945, when in the State service of the enemy committing any war crime or any crime against humanity", etc, any time that the act is committed against or in connection with a Netherlander or if any Netherlands interest is or can be harmed thereby, which last contingent condition the Court as appears from the statement declaring it proved, considers to be present, while the acts declared proved constitute at the same time the elements of one of the crimes referred to under A and B;

Considering, further, that by virtue of article 12 of the Special

Courts Decree these Courts are called upon to deal with such crimes exclusive of any other Netherlands judge;

Considering that the Netherlands legislator, this charging the Netherlands judge with the trial of such crimes, by whomsoever and wheresoever committed, with regard to the working of the Code has applied the principle of the so-called passive nationality in the defence of general or important individual Netherlands ~~interests~~ interests, the application of which principle has been accepted by various states in their legislation as an internationally recognised legal institution, this being the case both in the former existing legislation as well as in the new war legislation;

Considering that the only question remaining is, whether in the present case the application of this principle, laid down by a sovereign legislator, is limited by an exception recognised in international law, and whether such an exception cannot be pointed out in the case now being dealt with, whether it also does not appear in the documents quoted by counsel, namely: whether any rule or principle of international law cannot be advanced by virtue of which, in circumstances such as those concerning this accused, the application of the express provisions of law concerning the jurisdiction of a Netherlands judge would have to be set aside;

/more

Considering that such an exception is not indicated either in the well-known sentence of the Special Court of Cassation of 17 Feb. 1947 which was especially quoted by counsel in support of his point of view, which sentence on the contrary pronounced that in the light of legal developments since the first world war the trying by criminal law, of, among others, those who commit war crimes is also taking place more and by courts of the belligerent state which has been prejudiced, while the only thing the Court (i.e. Special Court of Cassation) demands is that the legislator must actualize his jurisdiction over enemy war criminals in the national sphere by a Netherlands law, which demand has now been provided for by the provisions quoted of the Special Penal Law Decree and the Special Courts Decree;

Considering that the circumstance that the accused is said to have committed the acts with which he is charged in his official relation to the State makes no difference here, in view of the fact that the Netherlands provision of law has expressly laid down the competence of the Netherlands judge with regard to persons in the enemy forces or in the state or public service of the enemy (article 4, Special Penal Law Decree, in conjunction with article 24a of the same decree), and with regard to his situation, again no international principle or provision can be pointed out which would provide an exception to this;

Considering that the Special Court therefore possesses the legal competence to try this case and rejects the above mentioned defence put forward by counsel;

Considering that the Court considers there to be no grounds for granting counsel's request that an inquiry be undertaken into the accused's mental faculties as there has been no indication of any sort that such an inquiry is necessary, irrespective of the opinion that the Court from its own observation has been able to form of the accused's mental faculties as shown by the punishment inflicted which appears later;

Considering that what has been declared proved above is punishable in law because it constitutes the crimes to be mentioned further on;

Considering that accused is therefore punishable, seeing that no grounds have appeared that would exclude him from this;

Considering with regard to the punishment to be inflicted, that the acts committed by the accused are horrible and repulsive and fully reflect the brutal system applied during the war from the German side to the inhabitants of occupied countries, which inhabitants were made to work as galley slaves in the German interest and were worked to death by persons such as the accused in the way declared proved,

so that numerous Netherlands were under a constant torment and wasting strain, which same must be said of civilians belonging to various of our Allies, the fate of whom cannot remain indifferent to the Netherlands and the Netherlands judge because through this also the interest of the Netherlands was harmed, while the continued series of grave ill-treatments which have been established, this in at least one demonstrable case, constituted, as the Court accepts on legal evidentiary grounds, a main cause of the death of a compatriot; that the accused deliberately made himself an accomplice in this system, while his liability to punishment cannot be excluded by his having taken a subordinate place in it, his personal guilt not being removed by this, while, furthermore, now still and during the sitting the accused has shown a total lack of feeling himself guilty and has tried to explain away his vile acts against the defenceless victims of raids and forced labour and to present them as being of no importance; that on fundamental grounds then, the Court is of the opinion that the accused's acts must be met by one of the heaviest punishments at the disposal of the Netherlands judge, although there are here two mitigating aspects:

1. the accused did not act on his own spontaneous initiative; he cannot it is true appeal to having to carry out strict orders, having most certainly thrashed and maltreated on his own account, but this he did as an assistant, drawn into the whole abominable system of terrorism and brutality carried out under the higher German Nazi administration against civilians of the occupied nations

2. that, as from its own observations during the sitting the Court has established and therefore considers proved, the accused's mental faculties are defective and undeveloped this state being accepted by the Court as having also existed at the time the acts declared proved were committed; that, it is true, no irresponsible statement resulted from this but the fact moves the Court to abandon the infliction of the severest penalty of all;

In view of articles 10, 27, 28, 44, 57, 302 of the Penal Code;

In view of articles 7b, 8, 9, 11, 12, 27, 27a of the Extraordinary Penal Law Decree;

Administering the Law in the Name of the Queen.

/ proved declares therefore, legally and convincingly/with the exception already considered that the accused committed the act with which he is charged in the summons, and that/has thus been proved constitutes:

"The during the time of the war begun by Germany against the Netherlands on 10 May 1940 but before 15 May 1945, in the State service of the enemy, being guilty of a crime against humanity as expressed in article 6, under c, of the Charter of the London Agreement of 8 August 1945, proclaimed by Royal Decree of 4 January 1946, embracing these crimes, and also the elements of: as an official, during the legitimate exercise of his function, intentionally inflicting on another, severe bodily injury which resulted in death, making use thereby of the power, opportunity and means offered him by the enemy and the fact of the enemy occupation, committed several times".

Declares it proved and the accused therefore liable to punishment:

Sentences the aforesaid accused,

WILHELM FRIEDRICH WALTER GERBSCH,

to fifteen years imprisonment;

Ordains that the time spent by the accused in custody before this sentence is put into execution shall be subtracted in full when the sentence is being served.

Declares not proved that which has been further or otherwise charged.

Acquits the accused therefore of this.

Deprives the accused of the right/ of:

/ serving in the forces;

this/ for the rest of his life.

- sentence -

Sentence passed by,
Prof. Dr. J.A. van HAMEL, President
Maj-General A.R.v.d.BENT) Judges
Dr. L.W.G.SCHOLTEN)

Dr. F.A.BRUIJSMA, deputy clerk of the court, being present in the council chamber, and pronounced on 25th May 1948 by the afore mentioned Prof.Dr.J.A. van HAMEL at the public session of the afore-said Special Court.

s/ van Hamel.
A.R. van den Bent,
L.W.G.Scholten.
F.A.Bruinsma.